FIU Law Review

Volume 15
Number 1 *Symposium: The Legal Legacy of the Special Court for Sierra Leone (Miami, Florida, 2020)*

Article 11

2021

The Legal Legacy of the Special Court for Sierra Leone: Amnesties

Dr. Alhagi B.M. Marong
United Nations Assistance Mission in Afghanistan, sherbin.marong@gmail.com

Online ISSN: 2643-7759

Recommended Citation
Dr. Alhagi B.M. Marong, *The Legal Legacy of the Special Court for Sierra Leone: Amnesties*, 15 FIU L. Rev. 41 (2021).
DOI: https://dx.doi.org/10.25148/lawrev.15.1.11

THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE: AMNESTIES

*Dr. Alhagi B.M. Marong**

I. INTRODUCTION

The Special Court for Sierra Leone (SCSL) was the first international criminal tribunal to have been established by way of a treaty between the United Nations and one of its Member States.[1] The Court's creation was consequent upon the request by then President of Sierra Leone, Ahmed Tejan Kabba, to the United Nations Security Council to help set up a strong and credible court to prosecute persons alleged to have committed serious violations of international humanitarian law and Sierra Leonean law during the course of that country's eleven-year internal armed conflict from 1991 to 2002.[2] President Kabba's quest for individual criminal accountability in relation to crimes committed during the brutal civil war between the Sierra Leone National Army (SLA) and rebels of the Revolutionary United Front (RUF) only came upon the back of failed attempts to negotiate and uphold a peaceful settlement of the armed conflict. In 1996, the Abidjan Peace Accord, signed between the Government and the RUF, was violated by the rebel group a few days after its signing, literally before the ink on the paper it was written on had dried up. Three years later, in 1999, the Government and the RUF signed the now historic Lomé Peace Agreement, which, *inter alia*, offered "absolute and free pardon and reprieve" (in other words, "unconditional amnesty") to all combatants in respect of anything done by

* Senior Legal Officer, United Nations Assistance Mission in Afghanistan (UNAMA). The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

1 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 12, 2002, 2178 U.N.T.S. 138. The Statute of the SCSL was annexed to the UN-Sierra-Leone Agreement.

2 Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, S/2000/786 (Aug. 10, 2000).

them in pursuance of their objectives prior to the signing of the peace agreement.[3]

In *The Legal Legacy of the Special Court for Sierra Leone*, Charles Jalloh undertakes an insightful study of the key legal legacies of the SCSL. While other studies have, in the past, addressed certain design and/or institutional features of the Court as well as some of its early jurisprudential footprint, this book is the first comprehensive study of the entire legal and jurisprudential record, from the earliest preliminary motions challenging the establishment and jurisdiction of the court, to the final judgement of the Appeals Chamber in the case involving the trial, conviction and imprisonment of the former President of Liberia, Charles Ghankay Taylor.

The book is a magisterial study of the legal legacy of what the United Nations Secretary-General has referred to as a "*sui generis*" court of mixed subject-matter jurisdiction and composition. The first part of the book reveals the eventful historical background of the SCSL, including the brutal civil war that led to the death of tens of thousands of Sierra Leoneans and the mutilation and maiming of many more; the establishment of the Court through the ingenious process of a treaty between Sierra Leone and the UN, rather than a Chapter VII resolution of the UN Security Council reflecting lessons learned from the funding and operation of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) respectively; the institutional structure of the court, including its innovative aspects such as a dedicated Defense Office to inject equality of arms with the Office of the Prosecutor; the Court's establishment in the *locus criminis* (the place the crimes were committed), and how this had facilitated the work of the Outreach Office, another unprecedented institutional mechanism to ensure that Sierra Leonean victims of the war had the opportunity to see justice being done to those who bore the greatest responsibility for egregious violations of their fundamental human rights. Also discussed is the hybrid character of the Court in terms of both its mixed *ratione materia* (subject matter) jurisdiction combining crimes under international and domestic law, as well as its mixed composition of international and Sierra Leonean personnel, including judges. This is followed by a discussion of the legal import of the term "greatest responsibility," the SCSL's thorny findings relating to the crime of "forced marriage," as well as its caselaw on the prohibition of the recruitment of children under sixteen years of age into the armed forces or the ranks of other

---

[3] Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Article IX, U.N. Doc. S/1999/777 (July 7, 1999) [hereinafter Lomé Peace Agreement]; *see also* Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, U.N. Doc. Article 14, S/1996/1034, (Nov. 30, 1996) [hereinafter Abidjan Peace Accord].

warring parties. The book also discusses the SCSL's caselaw on the applicability of immunities to former Heads of State and closes with a chapter on the work of the Truth and Reconciliation Commission, the other transitional justice mechanism that operated alongside the SCSL. All these issues are discussed with authority and nuance not only for the situation in Sierra Leone, but also for their implications for the wider field of public international and international criminal law.

II. AMNESTIES

The focus of my comment is on Professor Jalloh's treatment of the issue of amnesties as contained in a decision of the SCSL Appeals Chamber delivered in March 2004.[4] In a preliminary motion filed by two of the defendants, Morris Kallon and Brima Kamara, it was argued that the SCSL lacked jurisdiction to prosecute them because Article IX of the Lomé Peace Agreement granted an unconditional amnesty and pardon for all acts done by the parties in pursuance of their war objectives prior to 1999. According to the defendants, any such prosecution would constitute an abuse of the court's process because the Lomé Agreement was a treaty between the RUF and the Government, which could not be unliterally varied by either party. In the view of the defendants, by signing up to Article 10 of the SCSL Statute, which states that the Lomé Amnesty provision did not apply to international crimes under Articles 2 to 4 of the Statute, the Government was seeking to unilaterally vary the terms of the treaty with the RUF.

In Chapter 9 of the book, the author commences his analysis of the Appeal Chamber decision with a clear statement of the sole legal question, which, in his view, called for the judges' determination. That question was whether unconditional grants of amnesties by a government can bar prosecutions before an independent international criminal court for war crimes, crimes against humanity and other serious violations of international humanitarian law. In answering this question, the Appeals Chamber ruled that an amnesty granted by the authorities of a state, could not prevent the prosecution of the defendants for international crimes before an independent international tribunal. Although the author supports this conclusion of the Appeals Chamber, this was not without criticism. In his view, the judges' reasoning was muddled, and strayed into grand questions of international law, such as the formation of customary international law, universal jurisdiction, *jus cogens* and *erga omnes* obligations. While all these issues remain interesting from the perspective of general international law, they

[4] Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Lomé Amnesty Decision) (Mar. 13, 2004).

were perhaps not directly relevant to answering the ultimate legal question that was before the Court. So too was the extended discussion relating to the legal character of the Lomé Peace Agreement, whether insurgent groups had treaty-making power, and the legal status of such groups under international law.

I agree with the author that some of the analysis in the Appeal Chamber decision was not particularly relevant to the ultimate legal question before it. However, I would be more sympathetic to the judges. First, it is important to recall that this was the first time that the SCSL was faced with a challenge to its jurisdiction on the basis of an unconditional amnesty provision for international crimes contained in a peace treaty. Second, as the author notes, the SCSL decision was "among the first" by an international tribunal to consider this issue. For these reasons, it is perhaps unsurprising that the judges would explore broader international law questions given the historical moment they were faced with.

In assessing the legal status of the prohibition against amnesties for serious international crimes, the Appeals Chamber expressed the view that there was a crystallizing international norm that a government cannot grant amnesty for serious crimes under international law. The author criticizes the Judges' approach to this question, noting among other things, that judicial decisions should be based on interpretation of the law as it is, not as it ought to be. He adds that even if one were to accept that such a norm was emerging, the judges simply assumed, rather than demonstrated, its emergence by a thorough examination of state practice and *opinio juris*. In the end, the author rather scathingly concluded that the judges:

> seemed to go well out of [their] way to pronounce . . . on issues . . . a bit far removed from the amnesty question. . . . They navigated their way into the choppy waters of treaty and customary international law . . . and peremptory norms and obligations . . . . Oscillating somewhat conveniently between the law as it is, and the law as it ought to be, the judges reframed the issues. They were able to simplify the difficult issues before them . . . .[5]

From the perspective of the traditional sources of international law, the author's contention that judges should interpret and apply the *lex lata* (the law as it is), rather than *lex ferenda* (the law as it ought to be), is unassailable. So too is the author's preference for judicial modesty or restraint in the Appeals Chamber's framing of the issues before it. However, it does appear to me from the point of view of norm creation under international law, that

---

5 CHARLES C. JALLOH, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE 304 (2020).

the Judges' reasoning on this point is attractive for showing that even so-called contextual or crystallizing norms (in other words, norms in the process of formation), can have influence, including in the context of judicial decision-making. This is even more significant if one considers that the SCSL decision has been referred to by other judicial and non-judicial bodies dealing with the amnesty question.[6]

Despite his overall critique of the approach and some of the conclusions of the judges, the author does not hesitate to recognize that, through the Lomé Amnesty Decision, the SCSL added its voice to the emerging international practice frowning upon amnesties, and that this was a useful addition to the normative development of international criminal law. Clearly, as part of the legal legacy of the SCSL, it can be stated with a fair degree of conviction that the Appeals Chamber made a positive contribution to the development of international criminal law in this area by concluding that unconditional amnesties and pardons constitute sovereign acts of a state under municipal law, that cannot bar the prosecution of international crimes such as genocide, war crimes, crimes against humanity, and other serious violations of international law before independent international tribunals such as the SCSL. Similarly, due to the principle of universal jurisdiction, such amnesties cannot negate the rights of other states to exercise jurisdiction over persons alleged to have committed such crimes who are present within their jurisdiction.

The SCSL decision also highlights the importance of the practice of international organizations on this issue. The author notes the UN's stated understanding of the amnesty provision in the Lomé Peace Agreement as not applicable to international crimes of genocide, war crimes, crimes against humanity, and other serious violations of international humanitarian law. He adds that this only reflected the position of the UN Secretary-General as one organ of the Organization and is not attributable to other Member States of the UN. While as a formal matter this may be true, it is, however, important to note that since Lomé, the United Nations has invoked this position in a large and increasing number of contexts, which have been expressly endorsed by, or at a minimum, acquiesced to by Member States.[7] For this reason, the

---

6 The Prosecutor v. Saif al-Islam Gaddafi, ICC-01/11-01/11-0662, Decision on the admissibility challenge by Dr. Saif Al-Islam Gadaffi pursuant to Articles 17(1) (c), 19 and 20(3) of the Rome Statute, ¶ 61 (Apr. 5, 2019); *see also* Int'l Law Comm'n, Rep. of the Work of the Seventy-First Session, U.N. Doc. A/74/10, at 96 ¶ 11 (2019).

7 See the following non-exhaustive list of UN Security Council resolutions: S.C. Res. 1314, ¶ 2 (Aug. 11, 2000); S.C. Res. 1315, ¶ 5 (Aug. 14, 2000); S.C. Res. 1325, ¶ 11 (Oct. 31, 2000) (calling for the genocide, war crimes, and crimes against humanity, including those relating to sexual violence, to be excluded from amnesty provisions); S.C. Res. 1820, ¶ 4 (June 19, 2008) (noting that rape and other forms of sexual violence can constitute war crimes, crimes against humanity, and constitutive acts of genocide, and stressing the need to exclude such sexual violence crimes from amnesty provisions); S.C. Res. 2106,

SCSL decision adds to the corpus of international practice on the issue of amnesties for core international crimes, a practice that continues to gain influence among States.

The book recognizes the critical policy rationales that sometimes make the grant of amnesties an inevitable choice for Governments. This is true in situations of protracted violent conflict where some sort of inducement is the only realistic option Governments have, to bring an end to "unwinnable" wars and the human suffering that comes with them. As such, I agree with the author that it is unwise to completely rule out the relevance or applicability of amnesties, as a matter of law and policy, from the menu of options available to States to end conflict, restore peace, and promote national reconciliation. This much is clear from the frank statement of former President Kabba before the TRC, in which he did not mince words that the Lomé Amnesty was a deliberate policy choice of his Government to try to end the war and bring peace to Sierra Leone. The President was also unapologetic that, given the exceptional circumstances of the Sierra Leone situation in the late 1990s, the Lomé Amnesty Provision was envisioned to apply to both domestic and international crimes, despite the express wishes and counsel of the international community to the contrary.

In this regard, it is important to note that the United Nations encourages the use of "carefully crafted amnesties" as a means of restoring peace and security in post-conflict societies. Similarly, Article 6(5) of Additional Protocol II to the Geneva Conventions of 1949 supports the grant of the "broadest possible amnesty" to persons who had participated in an internal armed conflict or were detained as a result of it. This provision, which is understood not to apply to war crimes, is yet another demonstration of the potential usefulness of amnesties as an instrument to restore peace and reconciliation to war-torn societies.

III. CONCLUSION

This important book presents a critical but fair analysis of the SCSL's jurisprudence on amnesties for international crimes such as genocide, war crimes, crimes against humanity, and other serious violations of international law. It contains a clear statement of the contribution of the SCSL to this area of international criminal law and identifies some of the weaknesses in the judicial reasoning. It properly situates the value and limits of the practice of international organizations such as the United Nations as evidence of

¶ 12 (June 24, 2013) (stressing the need to exclude sexual violence crimes from amnesty provisions in the context of conflict resolution processes); S.C. Res. 2098, ¶ 25 (Mar. 28, 2013) (calling for the rejection of amnesties for genocide, war crimes, and crimes against humanity, or gross violations of human rights and international humanitarian law).

customary international law and adds clarity to the discourse on the legal validity of amnesties and pardons within municipal law as opposed to international law. In the end, it is not hard to predict that this book will become a leading tome for all academics and practitioners interested in studying the history and contribution of the SCSL to international criminal law.